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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 270

NORMAN C. NORMAN,

Petitioner,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF PETITIONER.

Opinion Below.

The opinion of the Court of Appeals (R., 20) is reported in 265 N. Y. 37. The Supreme Court of the State of New York and the Appellate Division thereof did not write any opinions.

Jurisdiction.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 344), since this is a cause wherein a final judgment has been rendered or passed on by the highest court of a state in which a decision would be had where is drawn in question the

validity of a statute of the United States. The date of the judgment of the Court below to be reviewed is July 9, 1934 (R., 19). A writ of certiorari was granted by this Court on October 8, 1934 (R., 24), directed to the Supreme Court of the State of New York, that being the court in possession of the record (*New York* v. *Kleinert*, 268 U. S. 646; *Hodges* v. *Snyder*, 261 U. S. 600).

The Decision of the Court Below.

1. The decision of the Court below, a state court, should be reviewed, because it has decided a federal question of substance not heretofore determined by this Court. This Court has never passed upon the constitutionality or effect of Public Resolution No. 10 of the Seventy-third Congress. It is a federal question of substance which involves the validity of the "gold clauses" contained in billions upon billions of dollars in private obligations.

2. The decision of the Court below should be reviewed because its interpretation of the contract for payment in gold is not in accord with the applicable decisions of this Court. This Court previously held that obligations calling for payment in specie must be discharged by such payment. (*Bronson* v. *Rodes*, 7 Wall. 229; *Trebilcock* v. *Wilson*, 12 Wall. 229.)

3. The decision of the Court below should be reviewed because it decided a federal question of substance, not heretofore passed upon by this Court. This Court has never decided whether payment in legal tender of an amount equivalent to the value of the specie, when payment in specie is impossible to perform, can be required as a discharge of the obligation. This Court in *Butler* v. *Horwitz*, 7 Wall. 258, has intimated that such payment could be required as a discharge of the obligation.

Statement.

On the first day of February, 1930, the petitioner purchased a bond of the Baltimore and Ohio Railroad Company, in the nominal sum of $1,000.00, containing the usual gold clause, that the principal and interest when they matured were payable in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930 (R., 6).

By the terms of the bond the Baltimore and Ohio Railroad Company agreed to pay to the holder interest at the rate of four and one-half percent per annum, payable semi-annually on the first days of February and August of each year, until 1960, when the bond matured. Coupons were attached to the bond for interest payments, which were to be presented and surrendered to the respondent (R., 6).

On February 1, 1934, the petitioner duly presented one of the said coupons, maturing on said date, which called for the payment of the nominal sum of $22.50, payable in gold as above set forth (R., 4). He demanded payment in gold coin, or if such payment were impossible, then payment by legal tender in the equivalent of said gold coin (R., 4). The equivalent would be $38.10, because by the Act of May, 1933, c. 25, Title III, Secs. 43, 48 Stat. 51, as amended by the "Gold Reserve Act of 1934" (see Appendix B), hereinafter referred to as "Gold Reserve Act of 1934," and the proclamation of the President of the United States issued pursuant to it dated January 31, 1934, Proclamation No. 2072-1934 (see Appendix C), the standard gold dollar was fixed to consist of 15 5/21 grains weight, nine-tenths fine, whereas the weight on February 1, 1930, was 25.8 grains, nine-tenths fine (R., 4). Act of March 4, 1900, 31 Stat. 45.

The respondent refused to pay gold coin or its equivalent (R., 4), but offered merely the nominal amount of the coupon, in coin or currency of the United States, other than gold coin and gold certificates (R., 10). This action was therefore begun in the Supreme Court of the State of New York, demanding that the petitioner should be awarded a judgment for the sum of $22.50 in gold coin of the United States of the standard of weight and fineness existing on February 1, 1930, or in the alternative for $38.10, representing the equivalent under the standard of weight and fineness existing on February 1, 1930 (R., 5).

The answer of the Baltimore & Ohio Railroad Company admitted all the allegations of the complaint (R., 9) but set up as an affirmative defense that by Public Resolution No. 10 of the Seventy-third Congress Act of June 5, 1933, c. 48, Sect. 1, 48 Stat. 113, 31 U. S. Code, Sect. 463 (see Appendix A), hereinafter referred to as Public Resolution No. 10, and other acts of Congress and the executive action pursuant thereto, it was prevented and prohibited from fulfilling its contract, and that it was authorized and required to pay only legal tender, dollar for dollar, in the nominal and face amount of the bond and coupon and that it offered to pay same to petitioner. The petitioner, in his reply, admitted that such offer was made, but was refused by him (R., 9).

The petitioner moved to strike out the affirmative defense on the ground that Public Resolution No. 10 was unconstitutional and for judgment on the pleadings (R., 2). Respondent also moved for judgment on the pleadings (R., 11). Petitioner's motion to strike out the affirmative defense was denied on the ground that Public Resolution No. 10 is constitutional and a judgment rendered in favor of petitioner for $22.50, the face amount of the coupon (R., 12). Under the pleadings, plaintiff

was concededly entitled to a judgment in this amount. The judgment, therefore, although nominally in favor of petitioner, was actually in favor of respondent, since for an amount concededly due petitioner under any theory of the case.

The petitioner having felt aggrieved that he did not receive more than the nominal sum of $22.50 appealed to the Appellate Division of the said Supreme Court (R., 1).

That Court affirmed the order and judgment of the lower Court, one justice not participating (R., 14). Petitioner then appealed to the Court of Appeals. The Court of Appeals affirmed the lower Court, one judge dissenting, and two not participating (R., 16). An opinion was written by the Chief Judge (R., 20) upholding Public Resolution No. 10 as constitutional. Judgment was accordingly entered in the Supreme Court of the State of New York on the remittitur of the Court of Appeals (R., 18, 19). This Court granted a writ of certiorari on October 8, 1934 (R., 24).

Specification of Errors.

1. That the Court below erred in denying petitioner's right to demand the payment of gold coin of the United States of the weight and fineness existing on February 1, 1930, or the equivalent thereof under a true construction of the "gold clause" contained in the obligations.

2. The Court below erred in holding that Public Resolution No. 10 of the Seventy-third Congress was constitutional and within the power conferred upon Congress under the United States Constitution and was not a violation of the Tenth Amendment thereof.

3. The Court below erred in holding that Public Resolution No. 10 did not deprive the petitioner of his prop-

erty without due process of law by impairing the obligation of his contract, taking his property for a private purpose and without compensation, denying him the equal protection of the laws, and by the unreasonable exercise of any power Congress might possess with regard to the subject matter.

4. That the Court below erred in affirming the decisions of the said Supreme Court of the State of New York and of the Appellate Division thereof, holding that petitioner was entitled to recover only $22.50 in legal tender, and denying petitioner the right to recover $22.50 in gold coin of the weight and fineness existing on February 1, 1930, or the equivalent thereof in legal tender, and in not holding to the contrary.

Summary of Argument.

PRELIMINARY—Economic and social problems considered.

POINT I—The "Gold Clause" implies a payment by the equivalent in the event performance with gold is impossible.

POINT II—Congress did not possess power to legislate with regard to the subject matter. The power is reserved to the States.

POINT III—Public Resolution No. 10 deprives petitioner of his property without due process of law, and without just compensation by,

(a) impairing the obligation of the contract,

(b) failing to provide just compensation,

(c) a taking which is not for a public use, but for a private purpose,

(d) denying petitioner the equal protection of the laws.

Economic and Social Considerations.

The problem at issue is a grave one indeed for both the Court and counsel. Not only does the decision involve an economic problem of great magnitude, but also constitutional principles of the highest importance. It may not be said that electing sides in this controversy is necessarily a choice of economic or social philosophy. The choice is rather the duty to uphold the constitution. It immediately recalls the admonition of Chief Justice Taft in *Bailey* v. *Drexel Furniture Company*, 259 U. S. 20 (1922):

> "The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards."

It is hardly necessary to point out that numerous bonds and obligations exist which contain a clause similar to the one involved in this review. In the Congressional debates at the time of the adoption of Public Resolution No. 10, it was variously estimated that there are such obligations to the extent of from ninety to one hundred and twenty-five billion dollars (77 Cong. 4534 ff.; 4905 ff.).

The first thought that therefore occurs to one is that a decision by this Court in favor of the petitioner, granting him the right to receive the equivalent of gold coin, would create bankruptcy, chaos, etc. We will presently show that such alarming view is not justifiable.

First, a glance at any bond exchange bulletin reveals that very few obligations mature at the same time. Most

of them will not mature for decades (see Fitch's *Bond Record*). In fact, the very basis of our entire credit system rests upon the assumption that not all people will demand payment at the same time. Should everyone at the same time venture to obtain, not gold, but paper money from their debtors there would not be enough paper money to pay all obligations.

Furthermore, the debtor may also be a creditor, thereby providing a balance. Thus, a bondholder of a corporation may also be a stockholder in it.

All emphasis, however, should not be placed on the debtor's lot. When the parties arranged the bargain, whereby the considerations passing from one to the other were measured with reference to a standard chosen by them, it is implied by such bargain that the obligation to repay in the future would have a certain value. That value was the bargain. It cannot be said that the creditor is now seeking $1.69 for the dollar agreed upon. To make such an observation is to confuse a function by the designation of a name. The parties did not contract for a dollar in name. They agreed upon a measure of the value of their bargain. Therefore, if the power of the dollar of the nominal sum of $1.69 is equal to that of the dollar of the nominal sum of $1.00, the parties are in parity. The result, therefore, expresses the true intent of the parties to exchange values. To take away from the creditor the right to receive the true value for which he contracted places him in a position which would moderately be called disadvantageous.

It is interesting to note that although the House of Lords in 1933 held that the debtors in similar obligations had to pay the equivalent of the gold (*Feist v. Societe Intercommunale Belge D'Electricite*, 150 Times L. R. 41 [1933], 88 A. L. R. 1524), nevertheless, bankruptcy

and chaos did not follow in its path, despite the fact of common knowledge that there are as many maturities of similar bonds payable in London as there are in the United States. On the contrary, reports indicate a revival of economic life there.

Thus, too, it is interesting to note that immediately after the Civil War in this country, beginning with the decision in *Bronson* v. *Rodes*, 7 Wall. 229, and a long line of cases subsequent to it, this Court required debtors in similar obligations to pay gold or the equivalent at a time when a dollar in paper was worth thirty-six cents in gold, and paper money was scarcely prevalent. Yet, this Court repeatedly affirmed that doctrine without bankrupting the country (Rhodes, *History of the United States*, Vol. 3, p. 563 ff.; do., Vol. 6, p. 258 ff.; David R. Dewey, *Financial History of the United States*, 10th ed., p. 333 ff.; p. 362 ff.).

Then again, a decision in favor of the petitioner may only mean that the president by proclamation may have to revalue the gold unit back to its status under the Act of March 4, 1900, 31 Stat. 45, and where it was until January 31, 1934. The president reserved such power to himself in his proclamation in these words:

> "This proclamation shall remain in full force and effect until and unless repealed or modified by Act of Congress or by subsequent proclamation; and notice is hereby given that I reserve the right by virtue of the authority vested in me to alter or modify this proclamation as the interest of the United States may require."

What may happen as a result of such revaluation one can only guess. A review of recent books and monographs on the subject by capable scholars reveals a disagreement beyond all measure. The closest agreement

seems to be that the monetary policies of the present administration are unwise and that the standard unit of the monetary system should never have been tampered with. The common core of such thought is that the administration attempted to raise price levels and to vie against foreign depreciated currencies by reducing the weight of the standard dollar. The objection is that such a policy is fallacious and leads to great uncertainty in credit.

They also indicate that the better practice would have been to stabilize prices by methods in the credit and economic system, and that the adverse effect of foreign depreciated currency would have been overcome by a flexible tariff, thus permitting a standard and unfluctuating monetary base upon which business credits could be extended with greater certainty and with the confidence so necessary for business stimulation.

For the aid of this Court a short bibliography on the subject is appended (see Appendix D).

Thus, we have demonstrated that the consequences of a favorable decision to the petitioner will not be followed by an economic cataclysm.

It may be urged that public opinion favors Public Resolution No. 10, and, therefore, it is a substitute for the amendment of the constitution. Assuming that public opinion can be discovered (Lowell, *Public Opinion and Popular Government*, Chaps. I-IV), we feel that there is no such feeling in favor of the monetary policies of the government. A reading of the newspapers, periodicals and current books will show an overwhelming rejection of the recent experiments with the currency.

As to the control of public opinion, we can only add the words of T. M. Cooley in his "Constitutional Limitations," pages 68, 69:

> "A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors * * * and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them: but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty."

See also

Hurtado v. *California*, 110 U. S. 516, 530.

Mr. Justice Cardozo once put it thus:

> "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (Holmes, J., in Northern Securities Co. v. United States, 193 U. S. 197, 400) are not to change their form and

> content in response to the 'hydraulic pressure' (Holmes, J., supra) exerted by great causes." *Doyle* v. *Hofstadter*, 257 N. Y. 244, 268.

Mr. Justice Holmes also made the following statement:

> "A strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way."
>
> *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416.

Dean Roscoe Pound contributed the following observation:

> "The idea with which we meet sometimes that courts should administer the will of the people for the time being in each case, is as unlegal and opposed to justice as the corresponding seventeenth century notion that in every case they ought to administer the will of the king for the time being." (Justice According to Law, 13 *Columbia Law Review* 696, 703.)

We took this occasion to dwell on the subject of public sentiment, because these are distressing times. Voices call from all directions urging now this course, now that course. The previous great monetary issue was decided in the case of *Knox* v. *Lee*, 12 Wall. 457 (1870). It is a matter of history what a great stir was created by that issue, and how the Court had reversed its own decision in *Hepburn* v. *Griswold*, 8 Wall. 603 (1869). Sachs, *Stare Decisis and the Legal Tender Cases*, 20 *Virginia Law Review* 856; Rhodes, op. cit., Vol. 3, p. 563; Vol. 6, p. 258.

POINT I.

The gold clause implies a payment in the equivalent of gold in the event performance with gold coin is impossible.

Before the Civil War two kinds of money existed, and contracts were dischargeable by the payment of either gold or silver. This existed until the passage of the Legal Tender Act around 1862.

Bronson v. *Rodes*, 7 Wall. 229 (1868).

During that period creditors possessing paper currency were in a bad plight. A dollar in paper was worth about thirty cents in relation to the dollar in gold. To guard against such a recurrence and against the free silver agitation of the 1890s, gold clauses similar to the one in issue were adopted. Consideration for the existence of such clause must be presumed. It is also a matter of common knowledge that bonds containing a gold clause were sold at a smaller interest rate than those without it.

> 77 *Cong. Record*, p. 4534. *Annals of the American Academy of Political and Social Science*, Vol. 165, p. 220.

Gold clauses were used for the very purpose of guarding against a depreciated currency. It is difficult for one to see what other intention could have existed in the minds of the parties in providing a special mode of payment.

In the case of *Bronson* v. *Rodes*, supra, and in a long line of cases following it, both before and after the decision in the Legal Tender Cases, *Knox* v. *Lee* (1871)

12 Wall. 457, this Court held that when the parties provided a special mode of payment in metallic currency, they were providing the holder of the obligation with a safeguard against a depreciated paper currency. *Butler* v. *Horwitz* (1868) 7 Wall. 258, 260; *Willard* v. *Taylor*, 8 Wall. 557 (1869); *Dewing* v. *Sears*, 11 Wall. 379; *Trebilcock* v. *Wilson*, 12 Wall. 687 (1872); *The Vaughan & Telegraph*, 14 Wall. 258; *Thompson* v. *Butler*, 95 U. S. 694; *The Emily Souder*, 17 Wall. 666; *Gregory* v. *Morris*, 96 U. S. 619; *Maryland* v. *Baltimore & Ohio Railroad Co.*, 22 Wall. 105; *Woodruff* v. *Mississippi*, 162 U. S. 291.

In the first case, *Bronson* v. *Rodes*, supra, the situation was as follows: In 1851, an owner of a parcel of property borrowed $1,400, secured by a mortgage on the parcel, payable in 1857 in gold and silver coin, lawful money of the United States. The property was conveyed to Rodes, who assumed to pay the debt. In January, 1865, Rodes tendered to Bronson legal tender in the form of United States notes in the sum of $1,507. The latter sum was equal in the nominal amount to the principal and interest due on the bond and mortgage. At that time, one dollar in coin was equal to $2.25 in United States notes. Bronson refused the tender, insisting upon payment in gold or silver. Thereupon, Rodes sued in equity to compel the discharge of the mortgage. The New York Court of Appeals had held that the tender of notes by Bronson entitled him to a discharge of his obligation.

This court, however, reversed the decision, and held that not only was the provision for payment in coin a lawful contract, but that the obligee could compel its payment, despite the fact that between the making of the loan in 1851 and the tender in 1865, legal tender had been made lawful for payment of all private debts. The Court, amongst other things, said:

> "We cannot suppose that it was intended by the provisions of the currency acts to enforce satisfaction of either contract by the tender of depreciated currency of any description equivalent only in nominal amount to the real value of the bullion or the coined dollars. Our conclusion therefore upon this part of the case is that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of certain fineness, ascertainable by count of coins made legal tender by statute: and this intent was lawful."

The respondent, however, asserts that although the parties intended that performance in terms of the gold clause, it is impossible for it to pay its obligation, because by the Act of October 6th, 1917, Sect. 5, 40 Stat. 415, as amended by the Act of March 9, 1933, c. 1, Sect. 2, 48 Stat. 1 (U. S. Code, Title 12, Sect. 95a, the "Gold Reserve Act of 1934" (Appendix B), the proclamations, and orders pursuant thereto, *all* gold has been withdrawn from circulation, coinage of gold has been discontinued, and all persons have been forbidden to possess it. In other words, there is no gold with which it can discharge its obligation.

Bearing in mind that the petitioner does not seek the gold coin itself, but primarily asks for its equivalent, several alternatives present themselves:

> (1) Since the parties agreed that payment should be made in gold coin and since it is

impossible to perform, no payments at all should be made by the respondent.

(2) The respondent should pay only the nominal amount in dollars of legal tender.

(3) The petitioner should pay the equivalent of the value of gold coin in dollars of lawful money.

In the first situation, it cannot be insisted that the respondent should be relieved from its obligation. The petitioner performed his side of the bargain by lending his money. The respondent promised to return it. The fact that the measure of the value of the dollar is not in circulation is no ground for excusing performance *in toto*. The respondent measured the value of the dollar by stating its bond in terms of the weight and fineness of the gold unit. The *measure* exists, although the *medium* of exchange has been abolished.

The parties intended that the respondent would perform in all events, save bankruptcy. The gold clause was placed in the obligation in order that it may be a more desirable obligation than those dischargeable by payment in ordinary dollars. If payment could have been provided for in ordinary dollars and such dollars now exist for payment, surely, it cannot be asserted that one possessing an obligation requiring performance in special dollars is in a worse position. If gold never returned as a medium of exchange, it would mean that holders of obligations which were performed on their part could never obtain performance from the obligor, even in ordinary dollars.

That this result was never intended by the parties is so patent that it requires very little argument to refute the contention (which the court made in the case of *In re Missouri Pacific Railroad Co.* (7 Fed. Supp. 1), that

because the *medium* of exchange is abolished and its possession made illegal, the *obligation* to pay the indebtedness therefore becomes illegal.

If one bears in mind that a unit dollar is not only a medium of exchange, but also a *measure* of value, then most difficulties will be alleviated.

Then again, it is a principle of the common law that when impossibility of performance exists as to only a part of the contract, the part that can be performed must be performed.

> *Williston, On Contracts*, Vol. 3, p. 3323, Sect. 1956; also p. 3293, Sect. 1938.

Thus, in *New York Central R. R. Co.* v. *Gray*, 239 U. S. 583, a person performed services for value for the railroad company. In consideration of his labor he received a pass for train passage. Thereafter, by law, passes were forbidden. This Court, distinguishing the case of *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467 (of which a good deal will be mentioned later), held that he could receive payment in dollars to discharge the obligation originally payable by a railroad pass. The railroad could not obtain the benefit of his labor, the value of which was easily measurable in terms of dollars, and then refuse performance just because the commodity with which it was to pay was outlawed. That case is one in which a barter was involved. The measures of value could not be ascertained merely by computation. Yet this Court allowed a recovery payable in a manner that was possible. The case at issue is a much stronger case, because it does not involve barter (a commodity exchange), but is one where the values were based on a fixed unit, and such values could easily be discovered by simple computation.

In the second alternative, it was indicated above that the long line of cases beginning with *Bronson* v. *Rodes* have asserted that the gold clause would be meaningless if a depreciated paper currency were sufficient to discharge the obligation in the nominal sum. See, especially, *Butler* v. *Horwitz*, *Trebilcock* v. *Wilson*, supra.

The third alternative requires the respondent to pay the equivalent of the value of the gold coin. It is this phase of the problem which vitally bears on petitioner's demand.

Gold can either be considered as a commodity or as a *unit for the measurement* of values. In the earlier cases of *Bronson* v. *Rodes* and *Butler* v. *Horwitz*, supra, this court implies that the gold clause was an agreement to deliver gold as a commodity. In the later cases, notably, *Trebilcock* v. *Wilson*, and *Thompson* v. *Butler*, supra, the position is changed, and the clause is deemed to require payment in money, but measured in the value of gold. The Court of Appeals also adopted the latter (R., 21). It should be noted that prior to the enactment of the "Gold Reserve Act of 1934" gold coins were interchangeable with bullion by law. U. S. Code, Title 31, Sects. 326, 327.

This Court in the above line of cases did not concern itself with the difference, because the result would have been the same in any theory. We here also contend that it does not matter whether the clause is regarded as a commodity contract or one of money, the result will follow in either case, viz., that the petitioner is entitled to receive the equivalent of the value of the gold coin. If it is regarded as a commodity contract, then the situation is similar to the case of *New York Central R. R. Co.* v. *Gray*, supra, where this Court held that the value of the commodity should be paid. See also, *Ortega* v. *Triay*, 260 U. S. 110. The value here could

be only what the parties agreed upon, that is, gold coin of the weight and fineness existing on February 1, 1930 (R., 6).

If the obligation be deemed a money contract then the intent of the parties indicates that the gold equivalent must be decreed. In the case of *Bronson* v. *Rodes* and the others following it, the intent of the parties was considered paramount. That intention was held to be an arrangement to safeguard the holder of the obligation against depreciated currency. That intention does not mean that gold coins actually must be delivered to the holder as the only means of discharge, if the holder elects to take something else in the equivalent. Thus, before our present financial arrangements, most transactions were purely credit transactions of bookkeeping entry and balance. A person with a gold bond would simply deposit his interest coupon in a bank and receive credit for it. Gold never entered into the transaction.

So, too, this court in *Butler* v. *Horwitz* and *Gregory* v. *Morris*, supra, held that if the holder of the obligation insisted upon the equivalent of gold, he was entitled to a judgment in those terms.

A further aid to the ascertainment of that intent can be found thus: the bond in this case is for the face amount of $1,000.00 with interest at four and one-half percent per annum, payable semi-annually in gold coin. The interest therefore is $22.50 arranged with convenient coupons for that amount. In 1930 when the obligation was created, gold coins existed in denominations of $20.00 and $2.50 (the coinage of the latter ceased in 1929, but it can be assumed that they were still in circulation). It so happens that this bond is in a round, even figure. But suppose, please, that the bond were for $1,001.00 or the interest were payable at four and one-fourth percent per annum, then the amount payable

would be an odd sum for which no denomination in gold coin exists. Payment with gold coin therefore could not be fulfilled.

In the case of the *Serbian Loans, Publications of the Permanent Court of International Justice*, Ser. A, No. 21 (1929) the following was said:

> "These were to be gold payments, but there were no gold coins for such amounts. It is manifest that the parties in providing for gold payments, were referring, not to payment in gold coins, but to gold as a standard of value. It would be in this way, naturally, that they would seek to avoid, as was admittedly their intention, the consequences of a fluctuation of the Serbian dinar."

Also in the case of the *Brazilian Loans, Publications of the Permanent Court of International Justice*, Sect. A, No. 20 (1929) the following was observed:

> "The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations. As for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold is obtainable.

The conclusion follows that the parties really never had in mind the actual delivery of the gold coin, but only the coin as a *measure* of value.

Recently, the House of Lords in England upheld a similar contention in a similar case. (*Feist* v. *Société Intercommunale Belge D'Electricité*, 150 Law Times Rep. 41 [1933], [88 L. R. A. 1524]). In that case a bond was issued in 1928 for the nominal sum of 500 pounds ster-

ling, principal and interest payable in gold coin of the standard weight and fineness existing on February 1, 1928. It was held that the intention of the parties was that satisfaction of the debt was not to be by gold coins, but by the value of the gold as the measure of the obligation.

In anticipation any argument that may be presented that by considering the gold clause as a *measure* of value the bond is rendered non-negotiable contrary to the intent of the parties. (Negotiable Instruments Law, Sect. 20, sub. 2), it is respectfully submitted that by the New York Negotiable Instruments Law, Sect. 25, sub. 5, provision is specifically made that the negotiability of an instrument is not affected by the fact that it designates a particular kind of currency in which payment is to be made.

In the case of *Chrysler* v. *Renois* (1870) 43 N. Y. 209, at common law, the New York Court of Appeals held that a bill of exchange payable in "gold dollars" is negotiable, wherein *Bronson* v. *Rodes* and *Butler* v. *Horwitz*, supra, were cited (pp. 214, 215).

POINT II.

Public Resolution No. 10 was enacted beyond the powers of Congress.

Having given a true construction to the terms of the bonds, we now turn to the effect of Public Resolution No. 10 upon it. That law declares that the existence of a gold clause in both public and *private* obligations to be against public policy. It also declares that any such obligations, *past* or future, shall be payable in lawful money of the United States, dollar for dollar, in the nominal sum of the bond.

Our first investigation leads us to analyze the powers of Congress to act with regard to such circumstances. It cannot be asserted that some inherent power exists in the federal government to make such laws, for it is well settled that the federal government is one of granted and enumerated powers. *Kansas* v. *Colorado*, 206 U. S. 46. Nor can it be asserted that the preamble to the Constitution enlarges or confers powers. *Yazoo Railroad Company* v. *Thomas*, 132 U. S. 174, 188; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 22.

Examining the express powers granted to Congress by the Constitution, Article I, Sect. 8, the following seem related to the question.

(1) The Congress shall have power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States.

(2) To borrow money on the credit of the United States.

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

(4) To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

(5) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

In none of the above express powers is anything found granting to Congress power to state that an obligation to pay in certain terms shall no longer be effective in those terms. The next possibility that may be presented is that the power to enact Public Resolution No. 10 is an implied and combined power, of the kind Chief Justice Marshall had in mind in *McCullough* v. *Maryland,* 4 Wheat. 316, 421, with the formula that if the object of the law is within constitutional powers, then any means that is *plainly adapted* to such end is a lawful implied power. These are his words:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Our next attack is to indicate that the means sought to be used by Congress are not plainly adapted to the end, but that the legislation is a patent guise of the type discredited by this Court.

The objects of the law are thus stated in the declaration of policy preceding the text of the law itself.

> "Whereas the holding of or dealing in gold affect the public interest and are, therefore, subject to proper regulation and restriction, and
>
> Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are in-

> consistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States in the markets and in the payment of debts."

Thus, the declared objects appear to be:

(1) To eliminate any obstruction to the power of Congress to regulate the value of the money of the United States;

(2) to eliminate any interference with the declared policy of Congress to maintain at all times the equal power of every dollar, coined or issued by the United States.

While ordinarily a legislative declaration of policy is entitled to great respect and weight (*Block* v. *Hirsch*, 256 U. S. 170), nevertheless, when one considers the history of this legislation and the growing tendency of legislatures to make such declarations whenever they are in doubt regarding the constitutionality of the law, the declaration must be examined with great caution.

In *Chastleton* v. *Sinclair*, 264 U. S. 543, 547, this Court stated:

> "We respect what was stated in Block v. Hirsch, 256 U. S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 264 U. S. 522, 536. And still more obviously so far as this declaration looks to the future it can be no more than a prophecy and is liable to be controlled by events."

Also in *Bunting* v. *Oregon*, 243 U. S. 426, this Court said:

> "It is, however, urged that we are bound by the declaration of the law or decision of the court. In other words, and to use counsel's language, 'the legislative declaration of necessity, even if the act followed such declaration, is not binding upon this court. *Coppage* v. *Kansas*, 236 U. S. 1. Of course, mere declaration cannot give character to a law nor turn illegal into legal operation, and when such attempt is palpable this court necessarily has the power of review."

This Court is not concerned with the wisdom of the act and with other non-justifiable questions. But in considering whether the means are plainly adapted to the end, the Court will necessarily inquire whether the facts are true.

The history of this legislation unfolded itself in the midst of other frantic measures to solve economic problems. This legislation was born in the attempts to raise prices to a 1926 level; and to erect a barrier against the influx of goods from countries with a depreciated currency (77 Cong. Record 2229, ff., 77 Cong. Record, 4526 ff.; 77 Cong. Record, 4889 ff.: Report No. 169, House of Representatives, Seventy-third Congress).

In placing a construction upon a Congressional act great weight is given to the reports of committees and to statements made on the floors of Congress (*Duplex Company* v. *Deering*, 254 U. S. 443, 474). An examination of the *Record* reveals that to accomplish the foregoing purposes it was deemed wise to sooner or later cut the gold content of the standard unit of value, the dollar, and still call it by the same name. By raising and lowering that content it was thought that magic

results would follow. Whether the results have been obtained is beside the point. But the object was to secure ease in raising and lowering the gold content. The main object in trying to raise the prices level was to relieve debtors from the increased burden of debt, resulting from the increased purchasing power of the dollar. Ergo, a lowered content of the gold unit would depreciate the value of the dollar, and thereby make the obligations of debtors closer to a level at which they were contracted (as if they were all contracted at the same time or at a 1926 level). Something, however, proved inconvenient, if not embarrassing, to this plan. That something was the gold clause contained in billions upon billions of dollars in obligations. If the gold content of the standard unit were decreased to relieve debtors, it meant that the decrease would also burden debtors obligated to pay according to a special gold content (or its equivalent).

Congress sought to resolve this dilemma by nullifying the gold obligation in contracts, and by declaring such obligations to be against public policy. This declaration of a new public policy was contradictory to the fact that this Court, beginning with *Bronson* v. *Rodes*, supra, declared such clauses to be valid, and after billions upon billions (shall it be said one hundred billions) of dollars of similar obligations had been created in reliance upon the decisions of this Court.

Congress took this step, to make every *nominal* dollar have the same power (see preamble to Public Resolution No. 10, "To maintain at all times the equal power of every dollar, coined or issued by the United States in the markets and in the payment of debts"). This step was taken despite the pronouncement of this Court in *Bronson* v. *Rodes*, supra, that obligations with gold clauses were created for the very purpose of guarding against depreciation of the currency, and that the holder of the obliga-

tion should receive the special treatment arranged by the parties.

From where did Congress derive this exercise of power? Is it from an implied money power or bankruptcy power? The consideration of these powers follows:

Subdivision 5 of Article I, Section 8, reads:

> "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard Weights and Measures."

No comments are to be found in the debates in the Federal Convention to form the Constitution which will be of assistance in interpreting this clause. Farrand, *Records of the Federal Convention of 1787*, Vol. 2, pp. 136, 143, 144, 159, 167, 182, 304, 308, 569, 595, 655; Elliot, *Debates on the Federal Constitution*, Vol. 5, pp. 130, 378, 434, 560; Bancroft, *History of the Formation of the Constitution of the United States;* Warren, *The Making of the Constitution.*

Since the grant of this power is so particularized, no serious dispute can arise if the plain meaning of the words are accepted. "To coin" means to strike an impression on a piece of metal. Thus, a medal is coined. To coin money is to give the impression a governmental authority (Webster's *International Dictionary*). "To regulate the value thereof" would mean to state the character of that coin in terms of its exchange value and to give it a content of a nominal amount. See also Holmes, J., in *Kent's Commentaries* (12 ed.), Vol. 1, p. 254.

That "to regulate the value of money" means that Congress can increase or lower the content of the unit according to a certain price level, or any other norm it chooses, we readily concede. But the point of our

contention is that to regulate the value of money does not imply that every obligation payable in money is susceptible of regulation by Congress.

In the case of *Fox* v. *Ohio*, 5 How. 410, the defendant was indicted and convicted under the laws of Ohio, forbidding the passing of counterfeit money. He objected to the validity of the statute, asserting that the power of Congress to coin money and to regulate the value thereof included the power of Congress to exclusively prohibit the passing of the bad money in transactions. This Court, however, denied that contention, and indicated the difference between laws against counterfeiting, i. e., the *manufacture* of false money and laws directed against *transactions*, in which such money is used. This Court distinctly denied that the money powers of Congress included the right to control *private transactions* within the states in the following words (p. 433):

> "We think the language of the constitution, by its proper signification, is limited to the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted." (p. 434) "It would follow from these views, that if within the power conferred by the clauses of the constitution, above quoted can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the constitution, or from any apparent or probable conflict which might arise between the federal and State authorities, operating each upon these distinct characters of offence."

It is thus seen that this Court previously limited the meaning of the phrase to its common meaning. What is more important for the purposes of this case—this Court there inferred that the money clause can have no reference to a direct control over a private transaction.

When the money powers were lodged in the federal government the obvious purpose was to create an authority that would establish a uniform standard, whereby transactions could be stated with reference to this uniform measure of exchange, and whereby obligations could be discharged with a uniform *medium* of exchange, having some relation to the uniform *measure* of exchange. The same idea of a uniform measure is patent in the same clause of subdivision 5, where Congress is granted power "to fix the Standard of Weights and Measures." Without a measure of exchange in terms of money, or a medium of exchange in like terms, the alternative would be a system of barter, which would be clumsy and varying.

In other words, money is merely an assistance to economic transactions. Without it, transactions would take place just the same, and obligations would be incurred.

There is no power in Congress to directly enlarge or diminish an obligation. Such powers belong to the States, if they exist at all. Congress, as we indicated, desired to tamper with the content of the gold unit. Therefore, it said that all gold obligations no longer existed according to their tenor. In other words, Congress found it *inadvisable* to lower the content of the dollar, because there were too many obligations with the gold clause outstanding. Therefore, for greater convenience, the obligations had to cease existing. If only one million dollars worth of such obligations existed, the inconvenience to the lowering of the content of the dollar would not have been deemed substantial. It would then

have followed that such obligations could exist, and therefore they were not part of the money power of Congress. Ergo, the relation of the obligation to the money powers of Congress depended upon the degree to which its power to increase or diminish the gold content was inconvenienced.

These gold obligations were no part of the monetary system. They were economic transactions in a price system. The money unit and medium were mere incidents of the transaction. Therefore, the transaction should not be obliterated in order that the unit might be tampered with.

It might be said that people by contracts payable in gold or in the equivalent would control the value of the currency, i. e., prevent a raising or lowering of the content. That thought is refuted by the argument that persons making such obligations do so in order to fix a more accurate *measure* of the value of their exchange.

Thus, the fact that gold is chosen as the standard unit of value is chiefly based on tradition (Keynes, *A Treatise on Money*, Vol. 2, p. 289; Withers, *The Meaning of Money*, 2 ed., pp. 9-22). The parties could use any other unit. If gold could not be chosen, then it would be silver, or copper, or wheat. The use of any standard as the measure of the intent of the parties does not, however, by "prophetic discernment" hinder the monetary functions of the government. Surely, if the value of wheat is used as the standard of measure, the power to regulate money would not be affected. It follows, therefore, that if parties receive an equivalent of any measure in paper money or credits, whether that measure be gold or wheat, the currency is not affected. The bargain is merely performed according to the intent of the parties. Congress indicated so much by providing in Public Resolution No. 10 that all gold clause obligations

should be paid "dollar for dollar" in lawful currency (paper money and coins other than gold). If payment in paper currency can be made for the nominal amount of the obligation without affecting the power over money, the inference is that payment in paper currency for a sum in addition to the mere nominal amount would have no effect upon the power to regulate.

For a clear understanding of the problem, the true significance of the transaction of the parties must be observed. If in 1926 a gold obligation was incurred, the situation from a formal point of view was as follows: Mr. Jones needed money badly. Mr. Smith, the banker, was willing to lend it to him. But Mr. Smith, an old man in experience, knew of the fluctuations of money in different crises. He did not feel that calling a thing a dollar meant that it was a dollar in value. He would not be fooled by names. He therefore said to Mr. Jones, "I'll lend you $1,000.00 in so much exchange value today, in consideration of your agreement to return to me the same exchange value when the obligation matures. We can provide to measure that exchange value by the value of your Rembrandts today, and by its value at the maturity of the obligation. But since your Rembrandts are so rare as to have a wide and fluctuating diversity of value, we will be hampered by choosing such measure of the value. It would be better to use something that has been used so often and has a more stable and more fixed market value; especially is this true, because the government has fixed the value of this unit and we can designate its value as of today's date. Let's choose the gold unit."

That is all the transaction means. The nominal dollar of 1926 is equivalent to a *nominal* sum of $1.69 in 1934. But the *actual* values, the true and realistic bargain of the parties, are equal. To argue therefore that the obliga-

tion should be scaled to a level of 1926 overlooks the fact that the parties (as in *Bronson* v. *Rodes*, etc.) had in mind, as their respective considerations, not nominal sums, but certain levels of exchange value. Any other interpretation would compel the creditor to accept something for which the parties did not exchange considerations.

It may be that the prohibition of the exportation of *coin* as in *Ling Su Fan* v. *United States*, 218 U. S. 312, may affect the currency system internally. But where the *equivalent* of the gold coin (acting as a unit of measurement) is sought there is no such fair relation to the monetary powers that Congress can confiscate such equivalent.

The Legal Tender Cases Distinguished.

Since counsel for the respondent in the courts below relied greatly upon the decision of this Court in The Legal Tender Cases, *Knox* v. *Lee*, 12 Wall. 457 (1870), that case should receive conspicuous attention. That case squarely reversed this Court's previous decision in *Hepburn* v. *Griswold*, 8 Wall. 603 (1869).

For an interesting history of the cases, consult Warren, *The Supreme Court in United States History*, Vol. 3, Chap. 31.

The facts and the issues are clearly distinguishable from this case. Without considering the principles involved, but merely citing precedent, one readily submits the case of *Trebilcock* v. *Wilson*, supra, as having made the distinction definite.

Turning now to a consideration of the facts and principles there considered, one finds that the issue was as follows: An obligation had been incurred prior to

the enactment of the Legal Tender Acts. The obligation was stated not in dollars measured in a specific manner. It merely provided for payment in nominal dollars. The question therefore was could acceptance of such paper dollars be compelled as a discharge of the obligation calling for payment in nominal dollars. This Court held by a five to four decision that *such* obligations could be discharged in that manner.

The Legal Tender Acts provided a paper money currency. Prior to their enactment the only currency in circulation was coins. In providing a paper currency, Congress impressed the paper with governmental authority, specified the denomination, and authorized that paper to have the power to discharge obligations. This Court held that Congress acted within the legitimate grant of constitutional power. That conclusion has been criticized as being beyond the intent of the framers of the Constitution (Tucker, *Constitution of the United States*, Vol. 1, 508 ff.; Tiedemann, *The Unwritten Constitution of the United States*, 135, 136; Hepburn, *History of Coinage and Currency in the United States*, p. 259).

But regardless of what criticism may be made of the Legal Tender Cases, the decision is inapplicable to this one. This Court there held that the paper had the characteristics of money and that acceptance of it could be compelled as payment of an obligation. In providing that power, the compulsion was directed at the mode of *payment*; nothing was said or done regarding the extent of the *obligation* of the contract. Furthermore, this Court distinguished the situation there involved of an obligation payable simply in *dollars* from one payable in gold coin. Said this Court (p. 548):

> "It is true that under the acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them,

> and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined money.)"

The obligation of the gold clause, we have demonstrated, is not the nominal face amount, but the equivalent of the gold coin. Therefore, when legal tender is endowed with power to pay an obligation, the measure of the obligation to be paid with such legal tender is the equivalent of the gold coin. If such reasoning is followed, no violence is done to the power of legal tender to discharge an obligation in dollars, nor will the *measure* of the obligation be affected.

The decision of this Court in *Trebilcock* v. *Wilson*, 12 Wall. 687 (1871), bears out the contention that the Legal Tender Cases, decided the year previously, did not affect this Court's decision in *Bronson* v. *Rodes*, supra, nor did the Legal Tender Acts endow paper currency with a power to discharge gold obligations by payment of the nominal amount (see also *Gregory* v. *Morris*, 96 U. S. 619).

In the *Trebilcock* case one Wilson gave Trebilcock his note in 1861 for the face amount of $900.00 payable in specie, and secured by a mortgage. In 1863 Wilson tendered the nominal face amount of $900.00 to Trebilcock in legal tender. The tender was refused on the ground that the note called for payment in specie. Wilson

thereupon brought an action to have mortgage discharged and cancelled. This Court following *Bronson* v. *Rodes*, supra, held (in 1871) that the tender was insufficient, because the words "in specie" had a different meaning from the words "in currency," and therefore the obligation was greater than one calling merely for payment in dollars current in the community.

The conclusion therefore as decided by the Legal Tender Cases is that Congress had the power to grant certain characteristics to paper and to compel its acceptance in payment of obligations. But those cases did not decide that by the power to compel acceptance of paper currency in discharge of an obligation implied a power to diminish an obligation that was measured in a special way. On the contrary, this Court repeatedly implied that the power did not exist.

It is therefore obvious that Congress attempted to exercise a power it did not possess. To obtain such power the money powers of the Constitution were conveniently chosen. This Court in the past had occasion to pass upon legislation that found no constitutional approval, but which purported to be disguised in another power.

Thus in *Mugler* v. *Kansas*, 123 U. S. 623, 661, this Court had occasion to say:

> "The Courts are not bound by mere forms, nor are they misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial rela-

> tion to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so *adjudge*, and thereby give effect to the constitution."

Chief Justice Marshall also said (*McCullough* v. *Maryland*, 4 Wheat. 316, 423):

> "Should Congress under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such decision come before it, to say that such an act was not the law of the land."

In the previous attempts to attach a power to a purported power this Court cautiously disapproved such trespasses. Outstanding examples follow:

(a) *Commerce.*

In the commerce power lies the most fruitful field for discernment. Here the leading case is *Hammer* v. *Dagenhart*, 247 U. S. 251. In that case Congress attempted to regulate child labor within the States by prohibiting the transportation in interstate commerce, of products of certain specified industries produced by children of certain ages within thirty days prior to their removal. It was there held that while the regulation of child labor was a desirable objective, the power to do so rested in the States, and not in Congress. That the power to regulate commerce included the right to bar the use of interstate transportation where the facilities would aid the accomplishment of an evil. Said the Court:

> "But it is insisted that adjudged cases in this Court establish the doctrine that the power to

regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate." * * * "In each of these instances the use of interstate transportation was *necessary to the accomplishment of harmful results*. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended" * * *

"Many causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions."

We asserted above that the use of gold as a measure of value is not an evil. Any object could be used as such a measure. Yet no one can insist that a contract calling for a payment measured by the value of any commodity is subject to action by Congress. This we submit is of greater moment when one considers that under the "Gold Reserve Act of 1934," the coining of gold has been withdrawn and gold as a circulating medium of exchange has been abolished. Now, it is only a base for values. It is now the same as the standard weights and measures kept in seclusion in Washington. Could anyone assert that Congress could pass a law under its power to regulate weights and measures, stating that a contract

for the delivery of a bushel of wheat could be discharged by the delivery of only half of a bushel?

In *Kidd* v. *Pearson* (1888), 128 U. S. 1, a suggestion was made that Congress might control industries through the commerce power. It was said in reply:

> "If it be held that the term includes regulation of all such manufacturers as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the States, with the power to regulate, not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."

In *United States* v. *Chicago, etc., R. R. Co.*, 282 U. S. 311 (1930), the Court disapproved the attempts of the Interstate Commerce Commission to control the reorganization fees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company on the ground that it was an interference with contract and property rights which were outside the power of Congress. There it was said (p. 327):

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. Monongahela Navigation Co. v. United States, 148 U. S. 312, 336; United States v. Joint Traffic Association, 171 U. S. 505, 571-572; Adair v. United States,

208 U. S. 611, 180. Both the liberty of contract and the right to property are here involved. The contract was valid, and had been adjudged by the Court having jurisdiction of the foreclosure and sale. The parties to it were willing and were entitled to have the contract executed according to its terms. There is no power in any department of the government to order otherwise."

In the First Employer's Liability Cases (207 U. S. 463) the Court, by Chief Justice White, rejected the argument that one engaged in interstate commerce puts all his *business activities within the reach of federal control.* There it was said:

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engaged in interstate commerce, **thereby submits all his business concerns to the** regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in Interstate Commerce he thereby endows Congress with power not delegated to it by the constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject,

> however, inherently local; would obliterate all the limitations of power imposed by the constitution, and would destroy the authority of the state as to all conceivable matters which from the beginning have been and must continue to be under their control so long as the constitution endures."

In *United States* v. *DeWitt*, 9 Wall. 41 (1869), an attempt was made under an Internal Revenue Act to punish anyone mixing or selling naptha and illuminating oils. It was held that this was a police regulation, relating exclusively to the internal trade of the States. "*This express grant of power to regulate commerce among* the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States."

In *Paul* v. *Virginia*, 8 Wall. 168, and in *Ducat* v. *Chicago*, 10 Wall. 410, the Court held that contracts of insurance could not be regulated by Congress.

> *Hill* v. *Wallace*, 259 U. S. 44 (1921) (grain futures);
> *Blumenstock Bros.* v. *Curtis*, 252 U. S. 436 (advertising);
> *Trade Mark Cases*, 100 U. S. 82 (trade marks).

(b) *Bankruptcy.*

In *United States* v. *Fox*, 95 U. S. 670 (1877) the defendant was indicted in a federal court for an offense against the United States which provided that "every person respecting whom proceedings in bankruptcy are commenced" who within three months before their commencement "under the false color and pretense of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or

chattels with intent to defraud," shall be punished by imprisonment.

The crime charged against the defendant was that he had obtained on credit goods from merchants in New York City upon the pretense of carrying on business as a manufacturer of clothing, whereas he was in fact carrying on a different business. There it was asserted:

> "There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is entrusted. And as it is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States' it may embrace within its legislation whatever may be deemed important to a complete an effective bankrupt system.
>
> "The act described is one which concerns only the State in which it is committed: it does not concern the United States."

It should be noted in this connection that bankruptcy laws are express laws that impair the obligations of contracts. That power is specific for that purpose, and includes the power to regulate the relation of debtor and creditor by the process of composition. If this specific power exists for those purposes, it can hardly be said that the power over money includes an implied power to compose and regulate the obligations between creditor and debtor.

In *Kent's Commentaries* (12 ed.), Vol. 1, page 254, Mr. Justice Holmes states:

> "It is hard to see how a limited power, which is expressly given, and which does not come up to a desired height, can be enlarged as an incident

> to some other express power: an express grant seems to exclude implications; the power to coin money means to strike off metallic medals (coins) and to make those medals legal tender (money). If the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender?"

See also dissent by Field, J., in Legal Tender Cases (12 Wall. 651) to the same effect.

(c) *Taxation.*

After the Supreme Court in *Hammer* v. *Dagenhart*, supra, had held the child labor law unconstitutional, an attempt was made to secure the regulation of child labor by placing a tax of ten percent upon the annual net profits of specified industries which employed children of designated ages. The law was held unconstitutional on the ground that the taxing powers of Congress were used for the obvious purpose of regulating child labor. (*Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20.)

> "Does this tax impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise, on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business" * * *

"In the light of these features of the act,' a court must be blind not to see that the so-called tax is imposed to stop the employment of children within age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?" * * *

"Grant the validity of this law, and all that Congress need do, hereafter, in seeking to take over its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

Veazie Bank v. *Fenno*, 8 Wall. 533, was there explained and distinguished.

See also *McCray* v. *United States*, 195 U. S. 27, 63, 64.

Consult McReynolds, J., dissenting in *Ruppert* v. *Caffey* (1919) 251 U. S. 264, at page 304, and *Lambert* v. *Yellowley*, 272 U. S. 581, at page 597.

Emergency Power Considered.

It may be contended that the power of Congress to legislate with regard to the subject matter is derived from an alleged emergency. Assuming such an emergency exists, this Court has stated that an emergency cannot

grant a power if none exists. This was recently reaffirmed in both majority and minority views in the case of *Home Building and Loan Association v. Blaisdell*, 290 U. S. 54:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations was thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

The doctrine of this Court applied to emergency legislation should be considered with greater particularity when applied to acts of Congress. When State legislation is involved, it is usually a sovereign body acting under its inherent sovereign powers. In such cases an emergency may call for immediate and drastic action, which, in light of the emergency may be deemed to be reasonable. But Congress acts only with regard to enumerated powers. In such a case an emergency does not create power, nor does it bring forth a dormant power, if none exists. It cannot be the occasion for a new power, if such power cannot be found among the express powers or those powers plainly adapted to a legitimate object. In other words, when Congress acts the power must be found to be an express or implied power. The emergency in such cases adds nothing to the power. If the power exists conditions in economic or social life may be the occasion for its exercise.

If this legislation purports to be based upon an emergency it is defective because there is no time limit set in the law as the duration of the emergency.

Chastleton Corp. v. Sinclair, 264 U. S. 543.

In the recent case of *Worthen v. Thomas*, 292 U. S. 426 (1934) a State statute provided that all proceeds of life and health insurance policies were to be exempt from the claim of creditors. The plaintiff recovered a judgment against the defendant for rent under a lease executed prior to the statute, and sought to execute against the proceeds of a life insurance policy of which the defendant was the beneficiary. This Court held that the statute could not impair the previously created agreement. The contention that the statute was only for the duration of an emergency was met with the reply (p. 432), "But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief" (p. 434). "In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction."

Should it be argued that the power is derived from the power of Congress to borrow money, petitioner submits in reply the very arguments set forth above regarding the alleged money power. In the debates in Congress (77 Cong. Record, p. 4890) Senator Fletcher stated that the reason the gold clause was nullified in private obligations was to provide an easier and more convenient market for government bonds. His thought was the gold clause had to be eliminated from public obligations. Therefore, they had to be eliminated from private bonds. The reason to him was that if gold clauses remained

in private obligations, investors would buy the latter in preference to the former, thereby providing too much competition for the government's market. That thought refutes itself. But it only emphasizes the remote and far-fetched subterfuges used to bring Public Resolution No. 10 within constitutional approval.

The situation is similar to what Mr. Justice Brandeis had in mind in the recent case of *Lynch* v. *United States*, 292 U. S. 571, 580 (1934) when he observed: "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."

If the integrity of obligations is essential to the government in concerning itself with its own obligations, then by all the stronger reason, it should not abrogate a private obligation in order to make the marketing of its securities more convenient.

Bankruptcy Power Considered.

Although the petitioner regards as remote any contention that Congress acted under a bankruptcy power, he nevertheless submits that any such argument is untenable. It might be argued that when Congress nullified the gold obligation, and thereby to that extent released the debtor, it acted within the scope and meaning of the bankruptcy clause. In reply, it is nevertheless asserted that bankruptcy, as it is known and has been construed, does not accept such a transaction within its significance. Bankruptcy is not only to provide a discharge for the debtor from his obligation, but is also for the distribution of his assets to his creditors. It is a condition to his discharge that he turn it over to them. (*Sturges* v. *Crowninshield*, 4 Wheat. 122.) The debtor here does not claim to be insolvent; nor does the statute

concern itself with that question. Furthermore, the law makes no provision for the disposition of the assets of the debtor. The release from the debt is merely the incident of bankruptcy. (15 *Harvard Law Review* 829.) In *Sexton* v. *Dreyfus*, 219 U. S. 339, it was said that our bankruptcy laws were taken from England. At the time of the American Revolution bankruptcy meant the seizing of the property of debtors, distributing their estate ratably among creditors, and granting the debtor a discharge. *Friday* v. *Hall & Kaul Co.*, 216 U. S. 449. In *Wilson* v. *City Bank*, 17 Wall 473, it was held to the effect that the primary object of bankruptcy law is to secure distribution of the bankrupt's property among creditors.

The contemporaneous enactment of Sections 77A and 77B to the Bankruptcy Act is indicative that the reorganization of companies and the adjustment of rights between debtors and their creditors come properly under the bankruptcy power.

Summary.

In President Jefferson's letter to Wilson C. Nicholas, Warren, *Supreme Court in the United States History* (Rev. Ed.), Vol. I, page 321, he said: "Our peculiar security is the possession of a written constitution. Let us not make it a blank paper by construction * * * I think it important in the present case [referring to his constitutional authority to execute the Louisiana Purchase] to set an example against broad construction by appealing for new power to the people."

His was an eloquent plea for the amendment of the constitution rather for a construction that would nullify the constitution. Beginning with the case of *Champion* v. *Ames*, 188 U. S. 321, a federal "police power" was developed by a wide significance given to the commerce

power of Congress. A halt, however, was called in *Hammer* v. *Dagenhart*, 247 U. S. 251, to a very fast encroaching federal centralized economic control. Perhaps such control is desirable. In such case, it would be much more convincing if the Constitution were amended. Witness what occurred with the income tax problem in *Pollack* v. *Farmer's Loan and Trust Company*, 157 U. S. 429; 158 U. S. 601, and how the Sixteenth Amendment was subsequently adopted.

If the gold clause legislation is to be considered derived from the money powers of Congress, a new field of unlimited centralized control will be opened with the possible application of the same principles derived from the monetary powers to any and every form of economic activity, including the wages of child labor, payable in money, and suspension of mortgage payments.

True it is that Chief Justice Marshall said (*McCullough* v. *Maryland*, 4 Wheat. 316, 407) "We must never forget that it is a *constitution* we are expounding—a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." From that statement, however, one cannot gather that in the process of adaptation, the phraseology of the constitution and the plain meaning of its words should be changed to mean something else, when circumstances beckon for adaptation.

From the very statement of the Chief Justice one can just as readily infer that when need arises the Constitution can be amended, and thereby endure for ages. Its survivorship can be predicted with a greater degree of probability if there is confidence that its grants and limitations mean what its plain words connote.

In all events, the meaning of the words should at

least be within the spirit of the Constitution. It will be agreed by all that from its beginning the Constitution has provided for a government consisting of the federal government and that of the states. The history of the colonies, and the debates in the convention, reveal it was the states that were to be the source of autonomous power. The federal government was merely an assistance, a mechanism, where uniformity of action was desired—and those were very limited. Perhaps, with the growing complexity of affairs, it may be a boon to have a federal economic government. But neither the spirit nor the letter of the Constitution provides for it. To permit the monetary power of the federal government to be interpreted as an authority for economic control over obligations payable in money would wipe out the dual form of our indestructable union consisting of indestructable states. *Texas* v. *White*, 7 Wall. 700.

What is desirable is altogether different from what is constitutional. This is especially true when an enumerated power is considered. To exercise a power under a guise may fulfill the needs of the hour. But it may prove to be an irreparable injury to the Constitution and to the faith placed in it. A decision in this case which would approve the attempted exercise of power will become a precedent for similar future attempted exercise of power under a guise. To be sure, precedents are the very life of the Constitution. In this, therefore, lies a very grave concern for our institutions. It may be that enormous property values are at stake (we have above dispelled the fears regarding bankruptcy and chaos). But faith in the Constitution is more precious.

POINT III.

Public Resolution No. 10 deprives the petitioner of his property without due process of law and without just compensation.

At the threshold we are faced with the problem whether the Fifth Amendment is a limitation upon the powers of Congress. In the courts below, the respondent argued that if the power of Congress is found within the powers in the Constitution, then such power is complete without limitation. The early decisions of this Court favored that view. For instance, in *Brushaber* v. *Union Pacific Railway Co.*, 240 U. S. 1 (1916) this Court in a case founded on the taxing power of Congress held that the Fifth Amendment could not limit the express powers of Congress, for that would create a limitation on a grant, which would be contradictory. Previous to that this Court in *McCray* v. *United States*, 195 U. S. 27, held that the Fifth and Tenth Amendments qualify all provisions of the Constitution. See, also, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 154; *Adair* v. *United States*, 208 U. S. 161, 172; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 545, 546, 561.

In *Fairbanks* v. *United States*, 181 U. S. 283, 289, it was said that limitations on grants are to be construed just as liberally as grants are construed.

In his dissenting opinion in *Wilson* v. *New*, 243 U. S. 332, 366, Mr. Justice Day said: "The due process clause restrains alike every branch of the Government, and is binding upon all who exercise federal power, whether of an executive, legislative or judicial character. It withholds from the executive the exercise of arbitrary authority, it prevents the judiciary from condemning one

in his person or property without orderly methods of procedure adapted to the situation, and an opportunity to be heard before judgment. We are now immediately concerned with its effect upon the exercise of legislative authority."

This Court has announced in recent years that even such paramount powers as the commerce (*United States* v. *Chicago, etc., R. R. Co.*, 282 U. S. 311, 327) and tax powers are subject to limitation by the Fifth Amendment.

In *Milliken* v. *United States*, 283 U. S. 15, this Court held a retroactive tax law to be a violation of the due process clause.

Consult also to the same effect *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Nicholas* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440.

The Impairment of the Obligation of the Contract.

Any law which releases part of an obligation impairs it (*Sturges* v. *Crowninshield*, supra). By the enactment of Public Resolution No. 10, a considerable part of the obligation was released. It may be said that the federal government may impair obligations of contract because there is no prohibition contained in the Constitution forbidding such action. It is just because there is no provision made for the direct impairment of contracts that Congress is prevented from passing a law to that effect. The federal government is one of enumerated delegated powers. If no power to impair contracts is granted, it is difficult to see how the power can be derived. The only power specifically mentioned in the Constitution to impair contracts, is the provision for bankruptcy laws. By necessary implication, bankruptcy laws impair contracts. Therefore, this fact alone indicates

that if the power to impair contracts were intended for the federal government, specific mention would have been made of it. The prohibition against State action, however, was specifically mentioned, because the omission in the Constitution to prohibit the States might have been deemed a permission for such legislation under the sovereign powers of the States which are inherent.

> "It is against all reason and justice for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done so." Per Chas., J., in *Calder* v. *Bull*, 3 Dall. 386, 388.

> "Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation * * * Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights, etc." *Federalist*, No. 44.

See also *T. M. Cooley in Story on the Constitution* (4 ed.), Vol. 2, Sect. 1399, page 261.

So far we have considered the lack of power in Congress to *directly* impair the obligation of a contract. We now further submit that such action by Congress deprived petitioner of his property without due process of law.

That the due process clause covers acts of Congress, impairing the obligation of contracts has been established in the *Sinking Fund Cases*, 99 U. S. 700, 718, where it is said:

> "The United States cannot any more than a

> State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States, they are prohibited from depriving persons or corporations of property without due process of law."

See, also, *United States* v. *Northern Pacific Co.*, 256 U. S. 51, 64; *Choate* v. *Trapp*, 224 U. S. 665, 674.

This Court previously said that if the exercise of power by Congress is *reasonable*, there can be no objection that the obligation is impaired as an incident to such action. (*Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170; *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398; *New York* v. *United States*, 257 U. S. 591, 601.)

In those cases, this Court insisted that the power be a legitimate exercise of power, and be reasonable. In *Blodgett* v. *Holden*, 275 U. S. 142, this Court held a retroactive tax law unconstitutional in violation of the Fifth Amendment, stating (p. 147): "It seems wholly unreasonable that one who in entire good faith and without the slightest premonition of such consequences, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

This case is submitted as a determination by this court that even the power of taxation, which has seldom been limited by the Court, nevertheless, is subject to a sense of fair dealing that those who could not reasonably have anticipated such legislation should not be penalized.

It was shown above that numerous similar contracts were created, especially after and in reliance upon the

decision of this Court in *Bronson* v. *Rodes*, supra. Now for the first time holders of such obligations are taken completely unaware by the declaration that such contracts are against public policy and the property rights thereunder confiscated. Such dealing cannot be considered fair or reasonable.

The decisions of *Louisville and Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467 (1911) and *Philadelphia, Baltimore and Washington R. R.* v. *Schubert*, 224 U. S. 603 (1912) can be distinguished.

In the *Mottley* case under the commerce power, the contract, a railroad pass was rendered nugatory and impossible of performance. Although the right to obtain free passage was nullified, nevertheless the Court pointed out in *New York Central Railroad Co.* v. *Gray*, 239 U. S. 583, that the *Mottley* case did not impair the contract so as to prevent the passenger from obtaining the equivalent of the pass and that which was possible to perform.

In the *Schubert* case an exemption provision from the Employers Liability Act was contained in a contract existing before the enactment of the law. It was held that the law did not impair the previously existing contract, because all contracts are made subject to the power of Congress to act and that individuals by "prophetic discernment" could not fetter such powers by previously arranged agreements.

In that case, however, no equivalent for the exemption clause could have been decreed. Therefore the provision fell completely. The action was therefore reasonable.

In the instant case, assuming that Congress had power to abrogate gold clauses, nevertheless, there remained

as in the *Gray* case, supra, the ability to provide for the payment of the equivalent. Congress could not, therefore, nullify the contract entirely, without providing a remedy for the equivalent (legislation over which was outside the power of Congress).

The Taking Without Just Compensation.

If Congress exercised the power to cancel the obligation of gold clauses, because it deemed it necessary for a better regulation of the monetary system, then, in such event, the property of petitioner was taken for a public use. In such event, adequate and just provision should have been made to compensate him for his loss in being required to take "dollar for dollar" in depreciated currency. Thus, in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, Congress, acting under its commerce power, sought to improve navigation by at the same time destroying a valuable franchise right. There the Court construed the word "take" not to mean physical dominion only, but to include the destruction of a valuable contract right. Said this Court (p. 336):

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment, and can take only on payment of just compensation."

See, also, *Ochoa* v. *Hernandez*, 230 U. S. 139.

In the *Monongahela* case this Court also said (p. 326) that the noun, "compensation," standing by itself, carries the idea of an equivalent.

Merely to state that a thing "obstructs" the exercise of a power does not take it out of the class of cases where compensation must be paid. In the *Monongahela* case it was sought to prove that the existence of the franchise was an "obstruction" which could be removed without payment. Actually, the franchise was merely an inconvenience. So in this case it is said that the existence of the gold clause provision is an "obstruction" to the regulation of the currency. Actually, it is no obstruction. It was merely a condition of inconvenience that rendered dollar devaluation inopportune. Therefore, the nullification of the obligation was not a regulation but an out and out taking for an alleged public need. See, also, *Osborn* v. *Nicholson*, 13 Wall. 654.

If the taking is not for the public purpose of regulating the currency, then it could only be construed as a taking of the property of the creditor for a *private* purpose, that is, to adjust the alleged inequality between the debtor and creditor.

The Petitioner Was Deprived of the Equal Protection of the Laws.

While no provision is found in the Fifth Amendment guaranteeing the equal protection of the laws, it seems that the provision for due process would assure such treatment.

> *McCray* v. *United States*, 195 U. S. 27, 61, 62;
> *Billings* v. *United States*, 232 U. S. 261, 283;
> *Second Employers Liability Cases*, 233 U. S. 1, 52;

Heiner v. *Donnan*, 285 U. S. 312, 326;
Lappin v. *Dist. of Col.*, 22 App. D. C. 68;
United States v. *Armstrong*, 265 F. 682, 691.

In the debates in Congress, Senator Thomas, in proposing the currency measures adopted by Congress, frankly stated their purpose was to transfer wealth from one class to the other (77 Cong. Record, 2229, ff.). It does not require citation of authority that the theory of our Constitution has not yet reached the point where the government is the adjuster of the disparities of fortune between the rich and poor, between creditor and debtor.

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity in favor of, or the deprivation of the right permitted worked against a larger class." Per Ch. Justice Taft in *Truax* v. *Corrigan*, 257 U. S. 312, 333.

There can be no preferring of one class of persons over another, except in cases where a public purpose is being carried out. (*Barbier* v. *Connolly*, 113 U. S. 27, 32.) Thus in the cedar rust cases, the trees were ordered destroyed because the State in the exercise of its police powers deemed the apple industry of greater importance to the community (*Miller* v. *Schoene*, 276 U. S. 272).

In the instant case, our contention has been not only that Congress did not have the power it exercised, but that a transfer of a property right was made from the class called creditors to those termed debtors, and that the object of the legislation was to fulfill that purpose.

Conclusion.

Wherefore, it is respectfully submitted that the judgment of the Court below should be reversed.

November 5th, 1934.

EMANUEL REDFIELD,
DALTON DWYER,
Attorneys for Petitioner.

APPENDIX A.

Public Resolution No. 10 of the Seventy-third Congress, Approved June 5, 1933, C. 48, § 1, 48 Stat. 113, 31 U. S. Code, § 463.

"JOINT RESOLUTION

TO ASSURE UNIFORM VALUE TO THE COINS AND CURRENCIES OF THE UNITED STATES.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin

or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined and issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'"

APPENDIX B.

Gold Reserve Act of 1934.

(Public—No. 87—73d Congress, Approved January 30, 1934)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. That the short title of this Act shall be the "Gold Reserve Act of 1934."

SECTION 2. (*a*) Upon the approval of this Act all right, title, and interest, and every claim of the Federal Reserve Board, of every Federal Reserve bank, and of every Federal Reserve agent, in and to any and all gold coin and gold bullion shall pass to and are hereby vested in the United States; * * *

* * * * *

SECTION 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold

may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (*a*) for industrial, professional, and artistic use; (*b*) by the Federal Reserve banks for the purpose of settling international balances; and, (*c*) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. * * *

* * * * *

SECTION 5. No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: *Provided, however,* That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C., title 31, sec. 367). All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct.

* * * * *

SECTION 12. Paragraph (*b*) (2), of section 43, title III, of the Act approved May 12, 1933 (Public, Numbered 10, Seventy-third Congress) is amended by adding two new sentences at the end thereof, reading as follows:

> "Nor shall the weight of the gold dollar be fixed in any event at more than 60 per centum of its present weight. The powers of the President

specified in this paragraph shall be deemed to be separate, distinct, and continuing powers, and may be exercised by him, from time to time, severally or together, whenever and as the expressed objects of this section in his judgment may require, except that such powers shall expire 2 years after the date of enactment of the Gold Reserve Act of 1934 unless the President shall sooner declare the existing emergency ended, but the President may extend such period for not more than 1 additional year after such date of proclamation recognizing the continuance of such emergency."

* * * * *

SECTION 13. All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed.

* * * * *

APPENDIX C.

A Proclamation

By the President of the United States of America

* * * * *

WHEREAS, I find, from my investigation, that, in order to stabilize domestic prices and to protect the foreign commerce against the adverse effect of depreciated foreign currencies, it is necessary to fix the weight of the gold dollar at 15 5 21 grains nine-tenths fine.

NOW, THEREFORE, be it known that I, FRANKLIN D. ROOSEVELT, President of the United States, by virtue of the authority vested in me by Section 43, Title III of said Act of May 12, 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare and fix the weight of the gold dollar to be 15 5 21 grains nine-tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation.

This proclamation shall remain in force and effect until and unless repealed or modified by act of Congress or by subsequent proclamation; and notice is hereby given that I reserve the right by virtue of the authority vested in me to alter or modify this proclamation as the interest of the United States may seem to require.

IN WITNESS WHEREOF I have hereunto set my hand and have caused the seal of the United States to be affixed.

DONE in the City of Washington at 3:10 o'clock in the afternoon, Eastern Standard Time, this 31st day of January, in the year
(SEAL) of our Lord one thousand nine hundred and thirty-four, and of the Independence of the United States the one hundred and fifty-eighth.

FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,
Secretary of State.

Approved and effective January 31, 1934.

APPENDIX D.

Anderson, B. M.—The Fallacy of the Stabilized Dollar.

Angell, N.—Story of Money.

Atkins, W. E.—Gold and Your Money.

Coughlin, C. E.—New Deal in Money.

Edie, L. D.—Dollars.

Encyclopedia of the Social Sciences, Vol. 6, p. 689 "Gold."

Fisher, I.—Inflation.

Fisher, I.—After Reflation What.

Garis, R. L.—Principles of Money and Credit.

Hardy, C. O.—Devaluation of the Dollar.

Kemmerer, E. W.—On Money.

Keynes—A Treatise on Money, 2 Vols.

Magee, J. D.—Introduction to Money and Credit.

Spahr, W. E.—The Monetary Theories of Warren and Pearson.

Sparling, E.—Primer of Inflation.

Warburg, J. P.—Money Muddle.

Warren & Pearson—Prices.